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NO. 37489-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In Re Personal Restraint Petition of:

SHAWN FRANCIS,

Petitioner.

PETITIONER'S REPLY BRIEF

PIERCE COUNTY SUPERIOR COURT NO. 95-1-05023-1

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A. INTRODUCTION

In his personal restraint petition (PRP) Shawn Francis has identified and requested relief from two double jeopardy violations. First, he contends that his conviction for second degree assault (count II) cannot stand because, pursuant to the Washington Supreme Court's recent decision in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), it is the same offense for double jeopardy purposes as the attempted first degree robbery charged in count III. Second, Francis maintains that his conviction for attempted first degree robbery (count III) violates double jeopardy because commission of that crime was also an element of the crime of first degree felony murder (count I).

Because Washington Supreme Court jurisprudence is not

entirely clear on the question of remedy when a plea agreement violates double jeopardy, Francis has requested relief in the alternative: either withdrawal of the entire plea agreement (his preferred remedy), or vacation of the convictions in count II and III and remand for resentencing on the crime of felony murder in the first degree.

In its *Response*, the State asks this Court to ignore *Freeman*, the leading Washington case on the application of double jeopardy principles to the crimes of robbery and assault. The State instead focuses on the fact that count III charged an *attempted* rather than a completed first degree robbery. The State then cherry-picks unproven "facts" from the record in its effort to avoid the conclusion that counts II and III constitute the same offense for double jeopardy purposes. In making its

strained argument, the State not only disregards the Washington Supreme Court's decision in *Freeman*, but also ignores or distorts those portions of the record that actually matter—the charging document and Francis' guilty plea.

The State's theory, taken to its logical conclusion, leads to absurd results. Had Francis actually obtained money during the incident, thus completing the crime of first degree robbery, *Freeman* would dictate vacation of the second degree assault conviction on double jeopardy grounds. But because the money was not actually taken, the State posits that the conviction for attempted first degree robbery—*a lesser included offense of first degree robbery*—no longer presents the same double jeopardy concerns. The State's position makes no sense, and this Court should reject it.

Next, the State argues that the attempted robbery charged in count III is somehow different from the attempted robbery which served as the predicate offense for the felony murder charged in count I. Again, the State misapplies controlling Washington Supreme Court authority—this time *State v. Tvedt,* 153 Wn.2d 705, 107 P.3d 728 (2005). And again, the State uses the fact that the robbery was not completed as justification for its declaring and interpreting the "facts" of the case in whatever manner suits its purpose.

Lastly, the State argues that Francis waived his double jeopardy claims because he pled guilty and his judgment is "facially valid." In taking this position, the State ignores a long line of authority from both the United States and Washington Supreme Courts. The State's position is meritless, and this

Court should summarily reject the State's waiver argument.

In the end, the most difficult question facing the Court is not whether Francis' convictions violate double jeopardy, but rather what remedy the Court should fashion for those violations.

B. ARGUMENT

1. The Second Degree Assault Charged in Count II and the Attempted First Degree Robbery Charged in Count III Constitute the Same Offense for Double Jeopardy Purposes.

In its *Response*, the State seizes on the fact that Francis was charged with and pled guilty to an attempted rather than a completed first degree robbery. Relying on three cases—*State v. Borrero*, *In Re Orange*, and *State v. Esparza*—the State essentially contends that if *any* "fact" other than the second degree assault can be hypothesized to constitute the "substantial

step" taken towards the commission of first degree robbery, then double jeopardy is not violated. *Response*, at 6-11. In advancing this claim, the State actually argues that *Freeman*—the leading case in Washington on the application of double jeopardy principles to the crimes of robbery and assault—"has nothing to do with the issue before the Court." *Response*, at 7 n.2. The State's argument is fatally flawed for several reasons, and this Court should reject it.

APPLICATION OF THE BLOCKBURGER TEST DOES NOT END THE DOUBLE JEOPARDY INQUIRY.

In its effort to defeat Francis' legal claims, the State incompletely and incorrectly applies the double jeopardy tests enunciated by the Washington Supreme Court in *State v. Freeman*. The ultimate goal of double jeopardy analysis is to determine whether the legislature intended to impose multiple

punishments for the crimes at issue, and the *Freeman* Court set forth four factors to be considered in making this determination: (1) "any express or implicit legislative intent;" (2) the "same evidence," or *Blockburger* test; (3) the "merger doctrine;" and (4) whether there is "an independent purpose or effect" to each crime. *Freeman*, 153 Wn.2d at 771-73; *see also Petitioner's Opening Brief*, at 12-16. The State, however, bases its argument almost exclusively on the *Blockburger* test, and the attendant difficulty in applying that test when one of the crimes at issue is an inchoate crime.

What the State fails to acknowledge is that the *Blockburger* test is but one factor to be examined in determining whether double jeopardy has been violated. "*Blockburger* is not dispositive of the question whether two offenses are the same."

Freeman, 153 Wn.2d at 777, quoting *In Re Percer*, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003); *see also State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007) (double jeopardy may be violated "*despite* a determination that the offenses involved clearly contained different legal elements") (emphasis in original).

Indeed, like the appellants in *Freeman*, Francis does not argue in his PRP that counts II and III satisfy the *Blockburger* test. The *Freeman* Court nevertheless concluded that even though second degree assault and first degree robbery do not satisfy the *Blockburger* test, "these two crimes will merge," and therefore create a double jeopardy violation, "***unless*** they have an independent purpose and effect." *Freeman*, 153 Wn.2d at 780 (emphasis supplied). The State fails to adequately address

either merger analysis or the question of whether the second degree assault had an "independent purpose or effect" from the attempted first degree robbery.

AS CHARGED IN THIS CASE, THE ASSAULT ON D'ANN JACOBSEN ELEVATED THE ATTEMPTED ROBBERY TO AN ATTEMPTED ROBBERY IN THE FIRST DEGREE. THE TWO CRIMES THEREFORE MERGE.

"Under the merger rule, ***assault committed in furtherance of a robbery merges with robbery*** and without contrary legislative intent or application of an exception, these crimes would merge." *Freeman*, 153 Wn.2d at 778 (emphasis supplied). The State asks this Court to hold that when an assault furthers an *attempted* robbery, that some different merger rule applies. The State is incorrect.

A "simple" robbery is elevated to first degree robbery if the defendant "is armed with a deadly weapon," "displays what

appears to be a firearm or other deadly weapon," or "inflicts bodily injury." RCW 9A.56.200(1)(a). In order to be guilty of attempted first degree robbery, a defendant must not only have the intent to commit that "***specific crime***," but must also engage in an "act which is a substantial step toward the commission of ***that crime***." RCW 9A.28.020(1) (emphasis supplied). "A 'substantial step' is conduct strongly corroborative of the actor's criminal purpose." *State v. Borrero*, 161 Wn.2d 532, 539, 167 P.3d 1106 (2007), *cert. denied*, 128 S.Ct. 1098 (2008). Thus, in order for Francis to be guilty of attempted first degree robbery, he had to engage in conduct which strongly corroborated an intent to commit robbery while armed with a deadly weapon, while displaying what appeared to be a deadly weapon, or under circumstances in which he inflicted bodily injury.

Here, the *Second Amended Information* filed by the prosecutor—and to which Francis pled guilty—unequivocally conveys that the attempted robbery committed by Francis was elevated to attempted first degree robbery because he "inflicted bodily injury upon D'Ann Jacobsen" during the course of the attempted robbery. *Petitioner's Opening Brief*, EXHIBIT D (count III). Francis' guilty plea—which the State quotes from selectively (and misleadingly)—also suggests that Francis himself understood that it was the infliction of injury on Jacobsen which elevated count III to an attempted first degree robbery:

> In Pierce County WA on Nov. 4, 1995 I struck Jason Lucas with a bat while attempting to rob Jason. When he didn't fall down, I struck him again. ***D'Ann Jacobsen was with him and when she screamed I swung the bat at her and hit her causing her substantial injury. I acknowledge my actions constitute a substantial step***

> ***toward robbing her and Jason.*** Quinn Spaulding convinced me to drive him out to Jason's so that he could rob him of the money Jason and D'Ann had recently gotten from her parents. When Jason came home, Quinn threatened to kill me if I didn't attack Jason. I know that Jason died as a result of my striking him. I am very sorry for what I did and wish I would have confronted Quinn instead.

Petitioner's Opening Brief, EXHIBIT A, at 4 (emphasis supplied).

The State invites the Court to "canvas the record to see if any act other than the" assault could constitute the substantial step towards the commission of attempted first degree robbery. *Response*, at 9. At the same time, however, the State urges the Court to disregard the language in the *Second Amended Information* which demonstrates that the assault on Jacobsen was specifically charged as the factor which elevated count III to attempted first degree robbery. *Response*, at 9. The Court

should decline both of the State's invitations, which are not only contradictory, but also unsupported by any legal authority.

The State cites *Borrero* for the proposition that the Court may "canvas the record" in order to decide Francis' double jeopardy claim, but *Borrero* says no such thing. The defendant in *Borrero* had a jury trial, and the Court simply looked to the trial testimony in making its determination whether the kidnapping committed by the defendant and his accomplice constituted the substantial step in the attempted commission of murder. *Borrero*, 161 Wn.2d at 537-39; *see also State v. Esparza*, 135 Wn. App. 54, 143 P.3d 612 (2006), *rev. denied*, 161 Wn.2d 1004 (2007) (basing double jeopardy analysis on trial court's finding of facts after bench trial). The State cites no authority—and Francis is not aware of any—which allows a

Court analyzing a double jeopardy claim to consider facts not charged, proven in court, or admitted to by the defendant.[1]

While inviting the Court to examine "facts" not proven or admitted to by Francis, the State simultaneously argues that the charging document is irrelevant to the Court's double jeopardy inquiry because factual assertions contained within it are "surplusage." *Response*, at 9. While this argument may have some validity if the Court were examining which elements the

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[1] An apt analogy to this situation arises when a court must determine whether an out-of-state or federal conviction is "comparable" to a Washington felony for purposes of calculating the offender score under the SRA. In that situation, the court is limited to reviewing those facts of the foreign conviction which were either admitted or stipulated to by the defendant, or which were proven to a trier of fact beyond a reasonable doubt. *State v. Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005). The Court should adopt a similar approach in analyzing a double jeopardy claim where, as here, the defendant pled guilty rather than going to trial.

State would have to prove to a jury at trial, it is inapposite here. In fact, the language in the charging document has everything to do with the double jeopardy issue in this case. For example, in *Orange*, the Washington Supreme Court looked specifically to language in the charging document—language that would normally be considered "surplusage"—in determining that Orange's convictions for attempted first degree murder and first degree assault of the same victim violated double jeopardy because they were based upon a single shot fired by Orange. In reaching this conclusion the Court relied on language in the charging document alleging that Orange committed the assault "***at the same time as the crime charged in count 2*** [the attempted murder]." *In Re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2005); *see also Esparza*, 135 Wn. App. at 62 (noting

that *Orange* had relied on the charging document in conducting its double jeopardy analysis).

Here, the charging document informed Francis that he was accused of attempted first degree robbery because he "inflicted bodily injury upon D'Ann Jacobsen" while attempting to rob her. This is the charging document Francis pled guilty to: "I plead guilty to the crime(s) . . . as charged in the amended information." *Petitioner's Opening Brief*, EXHIBIT A, at 4. In his guilty plea Francis admitted that he "swung the bat at her and hit her causing her substantial injury," and specifically acknowledged his "actions constitute a substantial step toward

robbing her and Jason."[2] In short, the assault on D'Ann Jacobsen with a baseball bat (count II) furthered the attempted robbery and was the act which elevated count III to an attempted first degree robbery. The Washington Supreme Courts analysis in *Freeman* dictates that these two crimes merge.

THE CRIMES CHARGED IN COUNTS TWO AND THREE DID NOT HAVE AN INDEPENDENT PURPOSE OR EFFECT.

One of the holdings of *Freeman* is that second degree assault and first degree robbery "will merge unless they have an independent purpose or effect." *Freeman*, 153 Wn.2d at 765.

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[2] If the Court wishes to consider extra-record facts, Francis has provided a sworn declaration (attached as SUPPLEMENTAL EXHIBIT ONE) in which he avers that when he pled guilty he "believed that the 'substantial step' [he] took towards committing a first degree robbery was the striking of D'Ann Jacobsen." SUPPLEMENTAL EXHIBIT ONE, at 2 ¶ 4.

The State simply ignores this part of the Freeman decision in its *Response*, perhaps with good reason, for it is overwhelmingly clear that the assault had no purpose or effect independent of the attempted first degree robbery. Rather, the assault was simply a component part of the attempted robbery. As noted in *Petitioner's Opening Brief*, the interdependence of these crimes is underscored by the trial court's finding that counts II and III constituted the "same criminal conduct" under the SRA. This finding necessarily required the trial court to conclude that the assault involved the "same criminal intent" as the attempted robbery—that it "furthered" the attempted robbery. *See* RCW 9.94A.589(1)(a) (formerly RCW 9.94A.400(1)(a)); *In re Connick*, 144 Wn.2d 442, 465, 28 P.3d 729 (2001).

The charging document, Francis' own statement in

pleading guilty, and the Washington Supreme Court's double jeopardy jurisprudence lead to a single conclusion: counts II and III are the same offense for double jeopardy purposes. The conviction for the lesser crime—the assault in the second degree—cannot stand.

2. <u>There Was Only One Attempted Robbery. The Attempted Robbery Charged in Count III Was the Predicate Felony for the Charge of Felony Murder in the First Degree. Accordingly, the Conviction on Count III Violates Double Jeopardy and Must Be Vacated.</u>

The State effectively concedes that Francis cannot be convicted of both felony murder and the predicate felony where the predicate crime is "inextricably linked" to the death. *Response*, at 12; *see State v. Williams*, 131 Wn. App. 488, 499-500, 128 P.3d 98, *remanded on other grounds*, 158 Wn.2d 1006 (2006) (predicate felony is an "essential element" of felony

murder; attempted first degree robbery merges with felony murder unless the attempted robbery is "merely incidental" to the homicide). However, as Francis anticipated, the State argues that the attempted first degree robbery charged in count III is a *different* attempted robbery than that alleged as the predicate felony in count I. Once again, the State seeks refuge in the fact that count III is an "attempt" crime, thereby allowing it to recast the facts in the light most favorable to its position. Once again, the State's analysis is incorrect.

Both parties agree that the controlling authority on what constitutes the unit of prosecution for robbery is set forth in *State v. Tvedt,* 153 Wn.2d 705, 107 P.3d 728 (2005). *Tvedt* holds:

> ***[T]he unit of prosecution for robbery is each taking*** of personal property from a person or from his or her

> presence against the person's will through the use or threat of force, violence or injury to a person or property, regardless of the number of items taken. ***A single taking can result in a conviction on one count of robbery, regardless of the number of persons present.***

Tvedt, 153 Wn.2d at 708 (emphasis supplied). Multiple counts of robbery cannot be "based on a single taking of property from or from the presence of multiple persons even if each has an interest in the property." *Tvedt*, 153 Wn.2d at 720. Thus, the unit of prosecution is not a function of the number of persons present during the robbery, nor of the number of persons who are placed in fear or whose will is overcome, but of the number of "takings" which occur.

Had Francis taken property from Lucas, and also taken property from Jacobsen, then under *Tvedt* two completed robberies would have occurred. But that is not what happened.

Here, there were *no* takings. Rather, in Francis' own words there was a single attempted taking of money that "Jason and D'Ann had recently gotten from her parents." *Petitioner's Opening Brief*, EXHIBIT A, at 4.[3]

There was one, unsuccessful attempt to take money from Lucas and Jacobsen. That single attempted robbery necessarily served as the predicate crime for the first degree felony murder charged in count I. Francis' conviction on count III violates double jeopardy.

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[3] In its *Response*, the State inexplicably asserts that "[s]ince defendant pled guilty, one may assume that he acted with the belief that both D'Ana [sic] and Jason had money on their person." *Response*, at 13. Francis' plea statement says nothing of the kind. In truth, Francis never even expected to see Jacobsen on the night of the incident. SUPPLEMENTAL EXHIBIT ONE, at 2 ¶ 4.

3. The State's Waiver Argument is Frivolous.

Although the State's waiver argument is not altogether clear, the State appears to contend that if Francis' judgment is "facially valid," then he "should be bound to the agreement entered with the State and has waived any double jeopardy argument." *Response*, at 14. Although the State cites to the Washington Supreme Court's opinion in *State v. Knight*, its argument is contradicted by that case.

Knight holds in part that because a double jeopardy claim goes to "the very power of the State to bring the defendant into court to answer the charge," such a claim "is not waived by guilty plea." *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008), citing *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) and *Menna v. New York*, 423

U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam). Far from deciding that Knight "should be bound to the agreement [she] entered with the State," the Court concludes that "Knight fulfilled the terms of the plea agreement even as she attacked her subsequent convictions. The terms of the agreement did not require Knight to waive double jeopardy protections." *Knight*, 162 Wn.2d at 813.

Francis never agreed to waive double jeopardy protections when he pled guilty. The double jeopardy violations at issue in this case are clear from the criminal statutes at issue, from the language of the charging document, and from Francis' guilty plea. There has been no waiver of double jeopardy.

4. Withdrawal of the Entire Guilty Plea Is a Permissible Remedy. Alternatively, the Court Should Vacate the Convictions in Counts II and III and Remand for Resentencing on Count I.

Francis acknowledges that the Washington Supreme Court's jurisprudence on the remedy issue is not a model of clarity. In its most recent pronouncement on this issue, the Court held that "vacating a conviction is the proper remedy when the conviction violates double jeopardy, even when entered pursuant to an indivisible plea agreement." *Knight*, 162 Wn.2d at 808. Yet the Court added this ambiguous statement: "***Since Knight does not seek to withdraw her plea*** nor does the double jeopardy clause ***require*** withdrawal of the plea, *Turley*[4] is inapposite here." *Knight*, 162 Wn.2d at 813 (emphasis supplied). If withdrawal of the entire plea agreement were

precluded in the case of a double jeopardy violation, Knight's desire (or lack thereof) to withdraw her plea would be irrelevant. What the Court seems to be saying is that when convictions entered pursuant to a plea agreement violate double jeopardy, it is not *necessary* to void the entire plea agreement in order to cure the error. What is unclear after *Knight* is whether voiding the entire plea agreement is the appropriate remedy if the petitioner seeks to do so. *Cf. Turley*, 149 Wn.2d at 399 (defendant who is misadvised of a direct consequence of a guilty plea has the initial choice of whether to withdraw the entire plea or to enforce specific performance of the plea agreement).

As noted in *Petitioner's Opening Brief*, it is difficult to

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[4] *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003).

reconcile *Knight* with the Court's decision in *In Re Shale*, 160 Wn.2d 489, 158 P.3d 588 (2007). In *Shale*, the Court refused to address Shale's double jeopardy challenge to several of the counts he had pled guilty to because he did not seek to withdraw from the entire plea agreement: "Shale cannot challenge a portion of the plea agreement." *Shale*, 160 Wn.2d at 494. Yet this is precisely what the defendant in *Knight* did—challenge a portion of a plea agreement on double jeopardy grounds. Unfortunately, the *Knight* decision does not even mention *Shale*.

Francis wishes to withdraw his "entire guilty plea" as a remedy for the double jeopardy violations which occurred here. SUPPLEMENTAL EXHIBIT ONE, at 3 ¶ 6. Alternatively, the Court should vacate the convictions in counts II and III and remand

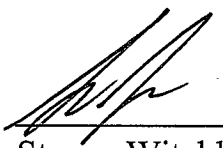
for resentencing on count I.

C. CONCLUSION

For the foregoing reasons, as well as those set forth in *Petitioner's Opening Brief*, this Court should grant Mr. Francis's petition.

DATED this 9th day of September, 2008.

Respectfully submitted,



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SUPPLEMENTAL EXHIBIT ONE:

Declaration of Shawn Francis

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE PERSONAL RESTRAINT PETITION OF: SHAWN FRANCIS, Petitioner,	No. 37489-7-II DECLARATION OF SHAWN FRANCIS

DECLARATION OF SHAWN FRANCIS

1. I am the petitioner in this case. I have read the State's response to my personal restraint petition. Because I disagree with the prosecutor's characterization of the facts of my case, my lawyer told me it would be okay for me to write this declaration.

2. I know this has nothing to do with the legal issues in my case, but I want to first say that I have always felt, and continue to feel nothing but overwhelming regret for causing Jason's death. Not a day goes by that I don't think long and hard about the fact that I am responsible for taking his life, and for causing unbearable pain and anguish to his family, his friends and D'Ann Jacobsen, who was also the

victim of my senseless actions in November 1995. I have also caused my own family great suffering, and I am very lucky that they have stood by me over the years.

3. I pled guilty in April 1996 because I wanted to take responsibility for the awful thing I did. At the same time, I want my punishment to be legal, and to be consistent with what I believed I was pleading guilty to.

4. When I pled guilty to the attempted first degree robbery charged in count three, I believed that the "substantial step" that I took towards committing a first degree robbery was the striking of D'Ann Jacobsen. That's what the second amended information stated. This is also what I meant when I said in my plea form that "D'Ann Jacobsen was with [Jason] and when she screamed I swung the bat at her and hit her causing her substantial injury. I acknowledge my actions constituted a substantial step toward robbing her and Jason." I want to add that at no time did I intend to take money from D'Ann's person. In fact, I did not expect to see D'Ann the night of the incident, and I was surprised that she was there with Jason.

5. My guilty plea was voluntary in the sense that I wanted to take (and still do accept) responsibility for causing Jason's death, and for striking and injuring D'Ann. However, my guilty plea was involuntary in the sense that I did not understand, as I now believe, that the structure of my plea deal violated double jeopardy. Had I known that to be the case I never would have pled guilty to that particular deal. I never intended to give up my protection against double jeopardy by pleading guilty. My lawyer at the time never even mentioned an issue of double jeopardy to me.

6. I do not know for sure what the legal remedy will be if the court decides that double jeopardy was violated. My first choice would be to withdraw my entire guilty plea, and hope that I might be able to renegotiate a plea bargain with the State that does not violate double jeopardy.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

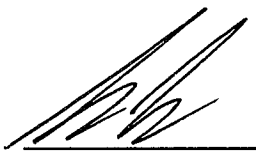
Shawn Francis

08/25/08 Monroe, WA.
Date and Place Signed

CERTIFICATE OF SERVICE

I, Steven Witchley, certify that on September 9, 2008, I served a copy of the attached brief on counsel for the respondent by having it mailed, first-class, postage prepaid to:

Michelle Luna-Green
Pierce County Prosecutor's Office
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171



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